BY MICHAEL B. GERRARD

Environmental Easements: A New Form of Property

One of the lessons of the federal and state Superfund programs in the 1980s and 1990s was that it is not always possible or sensible to remove every molecule of contamination. As a result many cleanup programs today allow some hazardous substances to be left behind. If this residual contamination needs ongoing management (such as pumping and treating) or barriers to prevent exposure (such as fences or caps), or it renders the land unsuitable for some uses (such as houses with lawns), it is necessary to ensure these obligations will be met into the future. Mechanisms to make sure this happens are called engineering controls (if they are physical)[1] and institutional controls (if they are nonphysical).[2]

A system to enforce engineering and institutional controls is now codified as Article 71 Title 36 of the New York Environmental Conservation Law, "Environmental Easements." It was adopted as part of the New York Brownfields Law of 2003, and such an easement is required for any site under the Brownfields Cleanup Program created by that law where engineering or institutional controls are utilized.[3] However, the same enactment also requires environmental easements whenever such controls are imposed under the Inactive Hazardous Waste Site Disposal Program (called the state Superfund)[4] or the Environmental Restoration Program (also known as the Bond Act Program).[5] The New York State Department of Environmental Conservation also appears likely to apply this requirement to sites that newly enter the oil spill program under the Navigation Law and the corrective action program under the Resource Conservation and Recovery Act; sites already in those programs, and in the old Voluntary Cleanup Program, are not likely to be covered.

Legislative Purpose

In creating environmental easements, the state Legislature declared "that when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, or includes engineered structures that must be maintained or protected against damage to be effective, it is necessary to provide an effective and enforceable means of ensuring the performance of maintenance, monitoring or operation requirements, and of ensuring the potential restriction of future uses of the land, including restrictions on drilling for or pumping groundwater for as long as any residual contamination remains hazardous."

The Legislature therefore declared that environmental easements "are necessary for the protection of human health and the environment and to achieve the requirements for remediation established at contaminated sites."[6]

• **Effect on Common Law.** Title 36 declares inapplicable several common-law restrictions on easements. It is not a defense to enforcement of an environmental easement that it is not appurtenant to an interest in real property, that it imposes a negative burden or affirmative obligations, that the benefit does not touch or concern real property, that there is no privity of estate or of contract, or that it imposes an unreasonable restraint on alienation.

In this way, and several others, environmental easements resemble conservation easements, a somewhat older form of property (adopted in New York in 1983) designed to allow environmentally sensitive lands to be preserved from development, with tax benefits flowing to the grantor.[7] A major difference, of course, is that conservation easements are generally imposed on pristine land while environmental easements apply to contaminated land. But both restrict use of property.

Form and Duration

An environmental easement must be a recordable instrument executed by the title owner, and it must be recorded. The New York State Department of Environmental Conservation issued for comment and published on its Web site, a draft form of easement indenture. (The comment period has closed.) This seven-page single-spaced form contains all the necessary recitations and declarations.[8]

Under the statute, an environmental easement runs with the land, binding the owner of the land and the owner's successors and assigns. It must be incorporated, either in full or by reference, into any leases, licenses or other instruments granting a right to use the property, as well as in any deeds or other instruments transferring an interest in the property.

The statute goes on to provide that an environmental easement is "enforceable in perpetuity." It may be held only by the state, and the only way it may be extinguished or amended is for the commissioner of environmental conservation to file the change with the land records office. If an environmental easement is intentionally violated, the Department of Environmental Conservation may revoke the certificate of completion — the document that enables a party in the Brownfields Cleanup Program to obtain tax credits and various other benefits.

Enforcement

An environmental easement may be enforced by any of three entities: the grantor; the state; and the government of the municipality where the property is located. It may be enforced against the owner of the property, any lessees, and "any person using the land." The statute explicitly renders inapplicable the doctrines of adverse possession, laches, estoppel or waiver as a way to defeat enforcement.

An additional enforcement mechanism engages the local government. Every environmental easement must be sent to the municipality. The statute provides, "Whenever an affected local government receives an applica-

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tion for a building permit or any other application affecting land use or development of land that is subject to an environmental easement and that may relate to or impact such easement, the affected local government shall notify the department [of environmental conservation] and refer such application to the department."

After that, the department "shall evaluate whether the application is consistent with the environmental easement and shall notify the affected local government of its determination in a timely fashion, considering the time frame for the local government's review of the application. The affected local government shall not approve the application until it receives approval from the department."

Other States

New York is not the first state to adopt an environmental easement law. Massachusetts enacted one back in 1983. Among the other states with similar laws are Arizona, California, Colorado, Connecticut, Florida, Indiana, Iowa, Michigan, Montana, New Jersey and North Carolina.[9] These laws have more similarities than differences, but some have provisions that go beyond New York's in certain respects. For example, Colorado's law requires the property owner to notify the state environmental department 15 days prior to any transfer of ownership.[10]

Because of the confusion and other difficulties that arise from variations from state to state, the National Conference of Commissioners on Uniform State Laws is working toward a national model. Its efforts began with a meeting of the Joint Editorial Board on Real Property Acts in Washington, D.C., in June 2001.[11] The U.S. Department of Defense (which is very interested in the issue because it owns so much contaminated land) provided funding, and an intensive drafting process ensued, culminating in the Uniform Environmental Covenants Act,[12] which was approved by the National Conference in August 2003 and recommended for enactment by all the states. Several states have considered this proposed law but none have yet adopted it.

These are some of the differences between New York's environmental easements law and the proposed uniform law:

- In New York, only the state may hold the easement; under the uniform law, any person (including a person that owns an interest in real property, the state environmental agency, or the municipality) may hold it.
- In New York, the Department of Environmental Conservation can extinguish or amend an environmental easement unilaterally; under the uniform law, the easement can be extinguished or amended only by a court, and only after the state agency "has determined that the intended benefits of the covenant can no longer be realized." The grantor, the current owner, the easement holder, and the state agency must all be parties to the action.

Because of confusion from states' variations, the National Conference of Commissioners on Uniform State Laws is working on a national model.

- In New York, an environmental easement can be enforced by the grantor, the state or the municipality; under the uniform law, any of these entities may go to court to enforce, but so may "a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant," and "any person to whom the covenant expressly grants power to enforce."
- In New York, the municipality must obtain the signoff of the Department of Environmental Conservation before allowing construction on land burdened by an environmental easement; there is no such requirement in the uniform law.

Federal Efforts

The U.S. Environmental Protection Agency has become very involved in the creation and implementation of engineering and institutional controls. One of its early forays into this area was a 1995 publication, "Land Use in the CERCLA Remedy Selection Process," which acknowledged that future land uses should be considered when deciding how Superfund sites should be cleaned up. That was followed by several documents that discussed these controls in greater detail: 'Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups" (September 2000); "Reuse Assessment: A Tool to Implement the Superfund Land Use Directive" (June 2001); "Institutional Controls: A Guide to Implementing, Monitoring and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups" (December 2002); and, most recently, "Strategy to Ensure Institutional Control Implementation at Superfund Sites" (September 2004).[13]

The EPA is currently preparing documents concerning institutional controls and community involvement; development of implementation and assurance plans for such controls; and calculation of the full-life cycle costs of institutional controls.

The Department of Defense has published a Policy on Land Use Controls Associated with Environmental Restoration Activities (January 2001) and Policy on Responsibility for Additional Environmental Cleanup after Transfer of Real Property (July 1997).

Finally, an important private organization, the American Society for Testing and Materials, published in April 2000 its "Standard Guide on the Use of Activity and Use Limitations, Including Institutional and Engineering Controls" (ASTM E2091).

With all this activity nationwide, ample experience is becoming available to assist parties in New York in shaping and implementing institutional and engineering controls.

1. Envtl. Conserv. L. §27-1405.11.
2. Envtl. Conserv. L. §27-1405.18.
3. Envtl. Conserv. L. §27-1419.2(E).
4. Envtl. Conserv. L. §27-1318(B).
5. Envtl. Conserv. L. §56-0503.2(g).
6. Envtl. Conserv. L. §71-3601.
7. Envtl. Conserv. L. §§49-0301 et seq.
8. www.dec.state.ny.us/website/der/easement.pdf.
9. See Roger D. Schwenke, "Applying and Enforcing Institutional Controls in the Labyrinth of Environmental Requirements — Do We Need More Than the Restatement of Servitudes to Turn Brownfields Green?," 38 Real Prop. Probate & Trust J. 295 (2003).
10. Daniel S. Miller, Colorado's Senate Bill 01-145, the "Environmental Covenant" Law, in Implementing Institutional Controls at Brownfields and Other Contaminated Sites (Amy L. Edwards, ed., American Bar Ass'n).
11. Kurt A. Strasser & William Breetz, "The Benefits of a Uniform State Law for Institutional Controls," in ibid.
12. www.environmentalcovenants.org.
13. All these documents are available at www.epa.gov.